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ABSTRACT

The role of the court on the campus is examined from the constitutional cases of the 1960s, through the expansion of administrative regulations during the 1970s, to the potential of judicial restraint and less government in the 1980s. It is agreed that the courts have pushed colleges and universities to higher ethical standards. These positive effects have often been obscured by the effects of decreased institutional autonomy and increased costs. Admittedly, the dependence of higher education on the courts and the legislature to act as its conscience may not have been healthy. Critics would argue that colleges and universities should be able to ethically regulate themselves without the government's role. The validity of the criticism may soon be tested. The outcome of the most frequently cited cases from the judiciary is examined, and the opinions of judges are used to show that great deference has been exhibited except in cases where many basic rights of individuals were violated. In these cases, a commitment to moral justice demanded that the courts intercede. In addition, regulations from the executive and administrative branches are examined in light of the goals to which the proponents of the legislation aspired. Speculation is offered on what would have happended without these laws. The trends of the 1980s toward judicial restraint and less government, and the implication of these trends for ethical standards in higher education, are explored. A bibliography and list of cases are appended. (SW)

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THE COURTS ON CAMPUS:
GOVERNMENTAL INTRUDER OR SOCIAL CONSCIENCE

A Presentation at the Annual Meeting of the
Association for the Study of Higher Education
March 2-3, 1982

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I. INTRODUCTION

In 1936 Edward C. Elliott and M. M. Chambers wrote one of the earliest volumes addressing the relationship between post-secondary education and law with the expectation that their work would aid administrators "charged with the responsibility of wisely conserving our higher educational institutions as these (laws) are tested and retested in those great laboratories of the law, the courts of justice" (p. x). The respect for and suggested deference to courts of law offered by Elliott and Chambers finds little support among contemporary college and university administrators.

Faculty members and administrators of the eighties are more likely to be sympathetic to the view expressed by William Kaplin in the preface to a more recent volume on law and education. Kaplin (1978) likens the arrival of law on campus sometimes to a beacon and other times to a blanket of groundfog. Borrowing from Carl Sandburg's "Fog" he wrote that unlike the fog, the law has not come "on little cat feet...nor has it sat silently on its haunches; nor will it soon move on" (p. vii). Rather, the law has come noisily and has stumbled; it has spoken and will continue to speak forcefully to higher education.

Contemporary literature addressing the relation between law and higher education suggests that writers today prefer Kaplin's invocation of the fog metaphor over that of the beacon. A lead article in an issue of the Ohio State University Monthly represents the feelings of many academics towards the courts. In reference to the university, the article begins:

"once a sanctuary, the university is now plagued with growing intervention" (The Campus and the Courts, 1980). Similarly, Couldner (1980) attacks litigation and its ever present threat on campus as leading to increased secrecy at most colleges and universities. This in turn, she suggests, thwarts attempts to maintain an atmosphere conducive to the growth of collegiality. Gouldner blames the wave of litigiousness for increased administrative hesitancy in decision making which has led to a crisis in confidence in university and college administrators. Overall, she warns that colleges and universities risk the danger of becoming communities dominated by legal norms; an option she does not view as attractive.

The fog, the plague, the assassin of collegiality--the law--is anathema to many individuals charged with the governance of colleges and universities. A literature, highly rhetorical in nature, but consistent in its condemnation of the law on campus has developed. Court intervention is seen as court intrusion because it is constraining, inhibits the expeditious running of a system, adds to the cost of education, and creates unnecessary uncertainty in an environment which is already difficult to control. Yet there must be some individuals who welcome the law on campus, or there would be no plaintiffs for the court actions brought against colleges and universities. Few of these individuals have utilized professional journals as a forum for presenting their views opting instead to argue their causes (quite often successfully) in the legislatures and the courtrooms.

Edwards (1980) is one of a small number of writers to argue that the law has a legitimate role on campus. Responding to the report of the Sloan Commission on Government and Higher Education he attacks many of the claims of the commission, including those citing the deleterious effects of governmental regulation of higher education. The latter claims, he states, are unsubstantiated. Specifically, he questions the accusation that the influence of the Federal government has forced colleges and universities to make a strong commitment to goals of social justice than to the traditional goals of freedom and education. Judge Edwards points out that social justice goals and educational goals need not be inconsistent, and that the increased commitment to social justice need not be at the expense of education. Furthermore, he questions the role of higher education in creating social injustices, suggesting perhaps a responsibility to help correct the situation. This alternative perspective, one which accepts, if not welcomes the role of law on campus, has had few defenders and has been under-represented in the literature.

Even a more moderate stance acknowledging both negative and positive effects of governmental interference has drawn few disciples. Millington (1979) is one of the few to examine the relation between law and higher education from this neutral stance recognizing a need to balance competing interests. About the relationship he writes:

> ...educators today are spinning tales about courtroom stories... Somehow, it seems, we have transformed academe into a giant courtroom, and the jury, as luck would have it, is always on the other side. No matter how strong or logical or certain your case may be, the argument goes, you are cooked. But this aggrieved antijudicial mood is perhaps best typified in the words of Grant Gilmore: "The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb...The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed." (p. 468)

Gilmore's words may typify the antijudicial mood of administrators who view less law as a means to a better campus society. Another interpretation of his words might be that the better the society, the less need there will be for law. Expansion of the law on campus may stem from actions on the part of universities which demonstrated a lack of social conscience thus forcing the judiciary to assume that role. Jenkins (1978) offers a similar view on the cause of judicial intervention in an article examining Supreme Court decisions in death penalty cases. He claims court "interference" on moral issues results from the fact that "ethical necessity becomes the mother of judicial invention and intervention" (p. 177). The view that the law on campus arises from ethical necessity merits further attention.

The title of this paper, "Courts on Campus: Governmental Intruder or Social Conscience", seems to set up an either-or situation; the law as intruder or the law as conscience. In fact, the two options are not mutually exclusive. All the reader need do is think back to his or her last "attack of conscience" to realize that when one is most acutely aware of one's conscience is when it is its most intrusive.

The increased presence of the law on campuses across this country has been costly in terms of time, money, autonomy, trust, and possibly collegiality. These costs have been instrumental in determining the predominant perception of the law as intruder. However, there is also support for a perception of the law as social conscience forcing institutions to more ethical behavior in instances when no other individual or institution was willing to serve that purpose. This paper will examine the ethical implications of the role the law has played on campus, momentarily putting aside the negative effects of its presence, focussing on its positive effects and postulating as to what might have happened but for the willingness of the law to "intrude" into academe. First, the outcome of the most frequently cited cases from the judiciary will be examined. The opinions of the judges will be used to show that great deference has been exhibited except in cases where very basic rights of individuals were violated. In these cases, a commitment to moral justice demanded that the courts intercede. Second, regulations from the executive and administrative branches will be examined in light of the goals to which the proponents of the legislation aspired. Speculation will be offered on what would have happened but for these laws. Lastly, the trends of the eighties towards judicial restraint and less government will be explored and the implication of these trends for ethical standards in higher education will be discussed.

The Relation Between Law and Morality

The suggestion of a relation between law and morality is not a new one. Hart (1961) argues that there are several similarities between laws and morals. Both share the same vocabulary; there are both legal and moral duties, obligations and rights. All legal systems reproduce at least some basic moral requirements. Killing and use of extreme forms of violence are clear examples of behavior prohibited both legally and morally. Finally, the concept of justice seems to be central to law morality. These commonalities suggest that law is best understood as a branch of morality, the view expressed by Natural Law theorists as well as some contemporary legal theorists (Hart, 1961). Legal Positivism, an alternative philosophy of law, represents the view that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality" (Hart, p. 181). Yet even Legal Positivists must accept some of the principles of Natural Law. Hume's abridged interpretation of the ideals of Natural Law would prove acceptable to most philosophical schools of law. Assuming that every society values survival as a minimal goal, he wrote:

> "Human nature cannot by any means subsist without the association of individuals: and that association never could have taken place were no regard paid to the laws of equity and justice" (Hume, Treatise of Human Nature, III, ii, quoted in Hart, p. 187).

Even Legal Positivists must accept the premise of a survival mandate in any society. As such there is at least some presence of Natural Law in any legal system, including the legal system of the United States. Hart (1961) posits that there are certain

universally recognized principles of conduct which may be considered the "minimum content of Natural Law." A condensation of more grandiose plans offered by Natural Law theorists, the following truisms constitute Hart's minimal content: (1) Human Vulnerability; (2) Approximate Equality; (3) Limited Altruism; (4) Limited Resources; and (5) Limited Understanding and Strength of Will. Human Vulnerability is always expressed in terms of restrictions on violence and acts of bodily harm. Approximate equality acknowledges differences among individuals but recognizes that no one is so powerful as to subdue others without their co-operation for longer than a short period of time. Approximate equality demands a system of mutual forbearance and compromise. Limited altruism recognizes that people are not devils; but neither are they angels. The fluctuation between the two extremes requires control. The existence of limited resources mandates a recognition of property and rules for respect of property. Obligations may be viewed as a form of property and respect for promises is expected. Finally, limited understanding and strength of will facilitate short range co-operation but don't suffice for the long range. This precipitates the need for voluntary co-operation in a coercive system.

These essentials, respect for the safety of the individual, approximate equality, respect for property, and respect for promises form a backdrop for the crucial elements of a legal and moral system. Since the participants in a system are not always angels, and they may lack farsightedness, there will be occasional

aberrations of conscience. At those times the legal system may act in a coercive (and intrusive) manner, to remind (and require) the errant individual or institution of ethical expectations. The courts and the legislatures have done just that in many of the cases and pieces of legislation affecting colleges and universities.

II. "JUDGE-MADE LAW" AND HIGHER EDUCATION

Interpretation and Non interpretation

Laws stem from each of the three branches of government. Among the most controversial are those which seem to originate within the judiciary. Laws originating in the judiciary are those cases in which a new law seems to flow from the bench, not an interpretation. These decisions are referred to as "judge-made law". The increase in judicial activism and accompanying judge-made law has led to criticism based on the fact that judges are not electorally accountable. Expansion of judge-made law has affected all areas of society and it has accounted for a large number of the cases affecting higher education. No branch of the law has been as affected as Constitutional Law. A brief examination of the options open to the judiciary in making constitutional decisions will lay a basis against which the role of the courts can be viewed.

Scholars disagree on the role of the courts in interpreting and/or "fleshing out" the United States Constitution. Pure "interpretivists" argue that the Constitution is a written document and that courts are confied to interpretations of the values enumerated by its framers. To interpretivists, the norm for judicial review would be one of judicial restraint. The argument continues that only by principled decisions with opinions based on the document can the court transcend its individual jurists. Unprincipled decisions which have the force of law allow the judiciary to usurp the power of the legislature.

a process anathema to democratic ideals. Bork (1971) argues:

> (T)he choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights (p. 8).

Pure interpretivists view the role of the court as primarily adjudicative. Ultimate responsibility would always revert to the people to amend the Constitution when necessary.

The alternative view is expressed by "noninterpretivists", who accept the positive law of the written Constitution but argue that the Constitution is more than a document. Grey (1978) argues that English Fundamental Law forms the basis for the American Constitution. Fundamental Law was (1) supreme law, (2) unwritten, drawing on usage, customs and the concept of natural justice, and (3) in some cases, enforcable over constitutional practice. According to Grey, the writings of Adams, Jefferson, and Wilson in 1774 all reflected a legalistic appeal to unwritten law. About the Constitution he writes:

> There can be little doubt that a prominent part of that framework was the traditional idea of a legally binding and unwritten constitution that had played so central a role in the dispute that led to independence. Those ideas formed the status quo in constitutional theory in 1776 (p. 893).

Noninterpretivists acknowledge a natural law basis for constitutional law, which mandates the courts to assume a role of judicial activism and at times to act as the national conscience.

The Warren Court validated judicial activism and with that activism a noninterpretivistic view of the Constitution. While the propriety of its decisions continues to be debated, Jenkins

(1978) has attempted to justify the court's noninterpretivism on ethical grounds. Examining the Supreme Court's decisions on the constitutionality of state death penalties he weighs the validity of the law against the need for social conscience. Viewing these court decisions as dilemmas in light of the conflict between the perceived need for interpretivism and the apparent mandate for outcomes not acceptable to interpretivists. Jenkins labels the decisions as "necessary but improper" (p. 169). Many of the higher education cases fall into this category. Jenkins blames society for forcing the judiciary into making ethically necessary but legally improper decisions. He states "we use the Federal judiciary to make us do what we know we ought to do but are unwilling to do" (p. 169). Jenkins allows the interpretivist the option of applying the "unwritten amendment", we, as a people, have been unwilling to approve. For interpetivists the problem lies not in that courts are choosing to act as conscience, but in that society is forcing the role upon them. Jenkins agrees the fault "lies not in our courts, but in ourselves" (p. 179).

Extending this argument to the role of the court on the campus, it doesn't matter which philosophy of judicial role one adopts. As a noninterpretivist, a jurist seeing that a college is violating Natural Law is obliged by law to try to bring it into compliance. As an interpretivist preferring not to address ethical issues, a jurist is ethically forced to do what he feels he has no legal basis to do because the college is unwilling to correct its errant way. In either case, the fault lies ultimately

with the college.

The increased presence of the courts on campus began with Constitutional cases in the sixties, many of which stemmed from the increased student activism and its expression on campuses. The Constitutional cases are paradigmatic of cases which arose from ethical necessity.

Fundamental Rights and the United States Constitution

In addition to establishing a government, the United States Constitution enumerated basic rights of individuals in its first ten amendments, the Bill of Rights. Several of these amendments embody principals of Natural Law and demand a special respect for the individual. They include a right to express an opinion, no matter how unpopular that view may be, to express that opinion in writing, or to meet in a peaceful manner with those of like mind or those holding opposing views. The similarities between these rights and academic freedom are apparent. Individuals are free from unwarranted search of their homes and persons. Liberty and property, both broadly defined, cannot be denied a person without due process, usually defined as a fair hearing. The Constitution was amended after the Civil War by the Fourteenth Amendment which guarantees equity, or equal protection of the law, and has been interpreted as applying the Bill of Rights to the states.

Most of the court cases involving colleges and universities in the sixties and seventies involved constitutional rights. It is difficult to imagine that a college or university would object to these basic rights. However, during the years of

institution-student relations governed by the doctrine of in loco parentis some administrators learned that efficacy could be used as a justifiable excuse for ethical short cuts. It took the courts to remind them that no matter how inconvenient or troublesome certain student activities might be (e.g. non-violent, non-disruptive protest) ethics demanded a respect for the rights of these individuals.

As the number of cases grew, faculty and administrative concern focussed on the number of institutional decisions overturned by the courts and the apparent accompanying loss of institutional autonomy. Few bothered to question whether or not the institutions had overstepped their bounds. As a result, the unethical behavior of the institution which necessitated court intervention was obscured by the ensuing argument over authority. Faculty and administrators saw the number of cases grow exponentially and documented the number of cases "lost" by colleges and universities. The basis for these decisions and the opinions of the court were inconsequential to those whose only concern was the autonomy of higher education.

The examination of the opinions of major judicial cases affecting higher education which follows finds a legitimate ethical basis for court "interference" in those cases which higher education "lost." Judicial deference to colleges and universities is documented in other opinions. In each case examined in this paper, the emphasis is on the rights of the individual and the institution, not on autonomy.

First Amendment Cases

The First Amendment embodies the freedom of speech, press and association. Moreso than any other Constitutional rights these freedoms have special meaning to higher education. Without these three guarantees the concept of academic freedom would be meaningless. It took the courts to require institutions to provide students with rights the country freely gave the institution. Ironically most of the Constitutional cases affecting higher education arose from the First Amendment.

Freedom of Speech

Siegel v Regents of the Univ. of Cal[1] demonstrated the courts willingness to put limits on constitutionally protected speech. The president-elect of the Associated Students at Berkeley spoke to a volatile group of students during a rally. He urged them to take control of a park. The university alleged that his wreckless choice of words led to violence and endangered the community. Siegel was placed on probation and excluded from his role as head of student government. Siegel filed suit arguing that the university had deprived him of his freedom of speech. Finding for the university, the court noted that his speech which resulted in lawless action was not an expression of opinion. He had violated the conduct code of the university and could be held accountable.

Siegel is an example of the willingness of the court to allow a university freedom to proscribe modes of conduct to maintain the order necessary to achieve its educational goals

as long as there is a rational basis for the prohibition and the rule is applied equitably. During the sixties, campuses were experiencing problems retaining previously unchallenged control over students. The courts were sympathetic to the administrators' desire to prevent chaos from reigning on campus, but they were unwilling to allow colleges and universities to maintain order at the expense of Constitutional rights. Behavior could be regulated, but the basic rights of expression, press and assembly had to be maintained. The courts were willing to accept reasonable time, place and manner restrictions on behavior but they were unwilling to give colleges and universities carte-blanche in determining student rights.

In Soglin v. Kauffman[2] the court encouraged colleges and universities to clarify the parameters which governed student conduct. The court refused to allow the University of Wisconsin to suspend students charged simply with "misconduct." The students, who were members of Students for a Democratic Society (SDS), while protesting the presence on campus of Dow Chemical recruiters, had blocked corridors and doorways and generally disrupted the interviewing process. The students alleged that the rule prohibiting misconduct was vague and overly broad and violated their first and fourteenth amendment rights. The courts agreed, stating that the misconduct charge could be used as a post-hoc rationalization to prevent any behavior of which the university disapproved. Giving the university wide latitude, the courts assured the university that they weren't requesting detailed, legalistic codes of student conduct, but they did need

a somewhat higher degree of specificity as to what constituted "misconduct." Only then could the court be sure of what motivated the actions of the university officials.

The courts have been critical of colleges clearly violating First Amendment rights. In Brooks v. Auburn University[3] the "open forum" nature of the university was addressed. The Reverend William Sloane Coffin had been invited to speak at Auburn. The Human Rights Forum had requested that he be invited, and the Public Affairs Seminar Board had unanimously approved the request. The president of the university announced that convicted felons would not be allowed to speak at Auburn because they might advocate breaking the law. This rule would prevent Reverend Coffin, a convicted felon, from appearing. The court agreed that the rule was not motivated by a rational basis, and represented a censorship of ideas. Quoting Judge Learned Hand, the court reprimanded the university and reminded it of its educative responsibility:

> It (the 1st amendment) presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.[4]

The finding of the court was that the university had attempted to control the content of speech to which students would be exposed, a form of censorship which violated the First Amendment.

Pickings v. Bruce[5] reaffirmed the commitment of the courts to protect the open forum nature of colleges and universities. Administrators at Southern State College in Arkansas sanctioned a student organization and faculty advisers for inviting an off-campus church group to speak on campus, and for refusing to

accede to a request by the administration that the invitation be rescinded. Recognizing the university's genuine concern about a possible conflict after a presentation of radical views on racism by the speakers, the court still reproached the university for its attempt to regulate the content of expression on campus. Quoting from the opinion in Tinker v. Des Moines Community School District[6], the opinion read:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk...[7]

It is odd that colleges and universities, long committed to a concept of academic freedom which keeps learning, teaching and research free of control would attempt to limit access to any form of knowledge. Although not specifically mentioned in the Constitution, Mr. Justice Douglas suggested that academic freedom is in the "penumbra" of First Amendment rights, and those rights belong to the entire university community. In Griswold v. Connecticut[8] he writes:

> The State may not, consistent with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press include not only the right to utter or to print, but the right to read...and freedom of inquiry, freedom of thought and freedom to teach...-indeed the freedom of the entire university community.[9]

Faculty members have also appealed to the courts to insure their rights to expression which many assumed were incorporated in their right of academic freedom. Civil Rights of faculty as private citizens are retained in spite of their relation with the university. In Cooper v. Ross[10] the court found that the exercise

of First Amendment rights had played a major part in Cooper's dismissal from the University of Arkansas at Little Rock and demanded that he be reinstated. The courts recognize the importance of balancing the rights of the individual while acting in a professional role against the rights of the institution working to achieve certain educational goals. Stating a willingness to uphold the dismissal of a faculty member when the basis for that dismissal is unprofessional behavior or for speech which is not constitutioanlly protected, the court in Starsky v. Williams[11] searched but was unable to find any such legal basis for the dismissal of Professor Starsky. Finding that all of Professor Starsky's acts of expression, while admittedly troublesome to the administration, constituted protected speech, the court found that the institution was not free to summarily dismiss him.

Freedom of the Press

Freedom of the press was the issue in Papish v. Board of Curators of the Univ. of Mo.[12] A graduate student in journalism was expelled for distributing a newspaper which contained forms of indecent speech. The paper included a reprint of a cartoon which depicted policement raping the Statue of Liberty and the Goddess of Justice. It also contained an article entitled "M..... F..... Acquitted." The Supreme Court found that the fears of the university were content based and had nothing to do with the time, place, or manner of distribution. While recognizing the distasteful nature of the content, the court affirmed that a "dual standard" of freedom of the press for the academic

community could not exist. In its decision, the court again cautioned the university against arbitrary judgments:

> We think...that the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name along of "conventions of decency".[13]

Another censorship case came before the Court of Appeals for the Fourth Circuit which prohibited the president of North Carolina Central University from denying funding for the student newspaper. Although the court understood the president's outrage at the onesidedness of editorials, the opinion in Joyner v. Whiting[14] stated that editorial comment alone is not grounds for censorship. The court affirmed that the editor had a responsibility to accept articles contrary to his philosophy, and that the president could work to guarantee that access, but access was not the issue before the court. In sum, that student press is free to publish whatever it chooses; the administration is not free to direct the content of the press.

Freedom of Association

Healy v. James[15] focuses on the right to association implicit in the First Amendment and includes one of the most severe judicial attacks on higher education in its opinion. A group of students formed an SDS chapter at Central Connecticut State College and petitioned the college for recognition as an official student organization. This formal recognition would allow the group to have access to bulletin boards, reserve meeting rooms, and provide other privileges to aid them in association. The Student Affairs Committee, while voicing concern over the nature

of the actions of the national SDS, recommended approval to the president. The president of the college refused to approve the petition, claiming the goals of the organization were in conflict with those of the university. Once again, the court reminded a college that costs are always involved in allowing freedom of expression or association, but the possible abuse of constitutional privileges was not a ground for denying those privileges. In a strongly worded concurring opinion, Justice Douglas states:

> ...the status quo of the college or university is the governing body (trustees or overseers), administrative officers, who include caretakers, and the police, and the faculty. Those groups have well-defined or vaguely inferred values to perpetuate. The customary technique has been to conceive of the minds of students as receptacles for the information which the faculty have garnered over the years. Education is commonly thought of as the process of filling the receptacles with which the faculty in its wisdom deems fit and proper... They (students) often have values, views and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated. When they ask for change, they, the students, speak in the tradition of Jefferson and Madison and the First Amendment.
>
> The First Amendment does not authorize violence. But it does authorize advocacy, group activities, and espousal of change.
>
> ...Without ferment of one kind or another, a college or university...becomes a useless appendage to a society which traditionally has reflected the spirit of rebelling.[16]

Granted, Douglas does not speak for the court; the language of his opinion is too strong for many of his brethren. However, it's evident that Justice Douglas expects that colleges should not only comply with the First Amendment, but be citadels of freedom of expression.

Attempts to expand the concept of right to association have met with mixed results. Gay Alliance of Students v. Matthews[17] resulted from the unwillingness of a state institution to recognize a gay student organization. Healy governed the decision in this case. The mere meeting of students to discuss common concerns, even to advocate changes in the law poses no threat of immediate lawless action. Therefore it does not matter that a group goes against the mainstream of thought on campus and may raise some politically sensitive issues, the content of speech cannot be regulated by nervous administrators.

The most recent case examining the issue of association dealt with the recognition of religious groups as student organizations on public campuses.[18] Cornerstone, a religious group, sought recognition as a student organization at the University of Missouri at Kansas City. The university denied the request citing the separation of church and state as justification. This argument was rejected by the Supreme Court. In the majority opinion, Mr. Justice Powell summed up the basis for rulings on the chartering of student organizations:

> Having created a forum generally open to student groups, the University seeks to enforce a content based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this...[19]

In the same opinion the court reminds the university that it is free to establish reasonable time, manner and place restrictions. However, once a forum (student organization) has been established, the university cannot decide what issues

may be addressed in any whimsical self serving way.

As evidence of the willingness of the court to defer to the judgement of colleges and universities, the court did not accept the premise of students at New Mexico State University who argued that a rule prohibiting visitation by members of the opposite sex in dormitories violated the right to association. The court supported the university and upheld the regulation as reasonable, noting it "serves legitimate educational purposes and promotes the welfare of the students of the University."[20] In similar cases, the court confirmed that the right of a university to set regulations regarding solicitation, canvassing and sales demonstrations in dormitories did not violate First Amendment guarantees.[21] The court is not interested in stripping colleges and universities of their power to set their own rules. With regard to constitutional rights, however, it is willing to monitor those regulations.

Fourth Amendment Cases

The Fourth Amendment has been invoked in cases of dormitory searches and the court has refused to view dormitories as any different from private homes. In Piazzola v. Watkins[22] the protection from search without a warrant was extended to dormitory rooms, and in Smith v. Lubbers[23] the court declared the university has no right to demand that students surrender Constitutional rights as a condition of enrollment. The university retains the right to request search warrants given probable cause, or in cases where a "compelling urgency" exists

to enter rooms without a warrant. Students retain a respect for their personal privacy and the privacy of their rooms.

Due Process Cases of the Fifth and Fourteenth Amendments

A Fourteenth Amendment case, Dixon v. Alabama State Board of Education[24], is cited as the case which marked the beginning of judicial application of constitutional safeguards to student-college conflicts. Dixon was one of several Alabama State College students who were dismissed from the college without notice or hearing. The dismissal was the result of a sit-in at a lunch grill at the Montgomery County Courthouse and other off-campus civil rights actions. Dixon was notified of his dismissal by mail. In response to his argument that the college had violated the Fourteenth Amendment, the court refused to classify continued enrollment as a life, liberty or property right, but did state that a student in good standing was at least entitled to a notice of charges and a hearing prior to dismissal from a state supported college.

Although this case opened the Constitutional floodgates for cases involving student-college conflicts, it was not intended as a step towards court intervention in education. Millington (1979) argues that Dixon was primarily a civil rights case. It was coincidental that an educational institution was included. In its opinion, the court was intentionally vague on what would constitute a fair hearing. Recognizing that a formal hearing "might be detrimental to the college's educational atmosphere and impractical to carry out",[25] the court deferred to the college

the right to determine the means to a fair hearing. Subsequent litigation has employed a balancing test to address issues of specific rights during a hearing (e.g. right to counsel, cross examination, right to appeal).

Courts have been reluctant to impose due process rights on colleges for academic dismissals. In Woody v. Burns[26] a Florida state court reserved the right to examine a case of academic dismissal to be sure it wasn't a disguised disciplinary action. However, in general, the courts have not interfered in academic matters. Connelly v. the Univ. of Vermont and State Agricultural College[27] affirmed the court's unwillingness to impose due process standards for academic dismissals absent a showing by the student that the dismissal was arbitrary and capricious.

The opinion in Board of Curators of the Univ. of Mo. v. Charlotte Horowitz,[28] a case involving the academic dismissal of a medical student, supports the contention that the judiciary will not interefere in university proceedings when students are dealt with in an ethical manner. After a dissatisfactory clinical experience, Ms. Horowitz was advanced on probationary status. She was informed that absent radical clinical improvement, she would be dropped from the school. The university eventually decided she would not graduate. Ms. Horowitz was subsequently allowed to take a special set of oral and practical exams as an appeal of the decision of the university. She worked with seven local physicians. A surgery rotation earned her low grades, but the university waited for more feedback. It was finally decided that she would not graduate. An appeal process to the provost

affirmed that decision.

Ms. Horowitz then appealed to the courts, arguing that she had liberty and property rights which had been deprived. The Supreme Court never felt the need to determine if her seat in medical school was a property right, because she had been afforded sufficient due process. In applauding the actions of the university, the court commended it for doing its job, and more:

> We agree with the district court that respondent was "afforded full procedural due process by the school . In fact the Court is of the opinion, and so finds, that the school went beyond constitutionally required procedural due process."[29]

These words by Justice Rehnquist suggest that when universities are fair in their actions with students, the court will act with restraint.

Faculty members faced with summary dismissal have also turned to the courts seeking justice. Professor Roth accused the University of Wisconsin of depriving him of both liberty and property rights without due process of law when administrators failed to renew his one year contract. In Board of Regents v. Roth[30] the Supreme Court concluded that the expectation of continued employment in a state institution was in fact a property right which could not be denied without due process of law. The finding did not benefit Roth, who, the court decided, had no basis upon which to expect continued employment. However the decision did affect another cases decided the same day. In Perry v. Sinderman[31] the court found a de facto tenure policy existed in the University of Texas System and therefore a property right of expected continued employment was involved.

A hearing was required before Perry could be dismissed.

Faculty and students alike learned that they should be able to expect justice in dealings with administrators at their colleges and universities. If the institutions were unwilling to provide this justice, then the courts were willing to intervene.

Cases Arising Under the Equal Protection Clause

To this point the argument has been presented that the United States Constitution effectively legislates basic moral rights. One flaw with arguing that the Constitution establishes a moral code is the fact that slavery was allowed to continue for over one hundred years. Amendments passed after the Civil War gave the force of law to the approximate equality which must be a part of any moral code. However, even with the assistance of the courts, equality proved an elusive goal. Not until 1954 did the courts take a major step towards desegregation when, in Brown v. Board of Education[32], it stated "in the field of public education the doctrine of "separate but equal" has no place."[33] The courts have treated higher education with greater deference, and more flexibility, than the compulsory public education system. No college of university has been taken into receivership. In Alabama State Teachers Ass'n v. Alabama Public School and College Authority[34] the court held that racially neutral admissions coupled with the recruitment of minority faculty satisfy the duty imposed by the Fourteenth Amendment even though traces of duality may still exist. Demands for equality in higher education have been further addressed by legislative and administrative means, a topic which will be examined later in this paper.

Most of the cases addressed by the judiciary involving higher education and the equal protection clause have involved the concept of reverse discrimination. It is somewhat ironic that an obvious action of conscience on the part of a university would be struck down by the Supreme Court on the grounds that it violated the Constitution. This happened in University of Cal. Regents v. Bakke[35]. However, only the method of quotas, not the idea of affirmative action, was declared unconstitutional. The University of California at Davis had reserved sixteen spaces at its Medical School for minority students. Alan Bakke, a white applicant, charged "reverse discrimination" violated his rights under the equal protection clause. The Supreme Court agreed that the university had violated his rights, stating:

> When a State's distribution of benefits or imposition of burdens hinges on the color of a person's skin or ancestry that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest.[36]

In the same decision, Justice Powell formed a separate majority with the four dissenters, allowing colleges to consider race as one of the many factors which add to the attractiveness of a candidate in the admissions process. Once again the language of the court suggested approval of the goal of the university and assured it that with regard to future admissions plans good faith would be presumed by the court in the absence of any showing of evidence to the contrary.

Contract Law

Most, but not all, "judge-made law" affecting higher education

has a Constitutional basis. Other cases arise under contract law. These cases stem from the view of student as consumer, the perspective that proposes a student contracts with an institution for some product, presumably an education or a degree. Cases involving actual contractual agreements between faculty members and the institution, especially with regard to tenure, also fall in this category.

The student as consumer metaphor uses an analogy of each student contracting with a given institution for services, and the document most frequently cited as analogous to a contract is the college bulletin. Natural Law demands that one live up to his commitments or contracts. Honesty demands that colleges and universities must not misrepresent themselves or "falsely advertise" in catalogues. If they do misrepresent the facts then they should and can be held accountable. However, college catalogues cannot be viewed by students as a set of unalterable conditions. The dynamic nature of education demands flexibility to make changes.

The courts have been reluctant to apply contract law directly to the student-college relation. They are more likely to view the relation as quasi-contractual or contractual in nature. However, when the court found that a medical school used criteria other than those explicitly stated in its catalogue to evaluate applicants, it found a clear contract existed and that contract had been violated.[37] The applicant had provided the school with $15.00 in exchange for the evaluation of his credentials along the criteria in its bulletin. When the school used a

different set of criteria, they violated the contract.

The courts have also indicated a willingness to examine implied contracts. Students encouraged to remain in a program at one university after the program had lost its accreditation were assured by administrators that re-accreditation would be sought. Subsequently, the university decided to phase out the program, contradicting earlier promises.[38] If the students can demonstrate that they suffered a loss due to this apparent violation of contract (e.g. credits won't transfer, loss of status, etc.) the courts are willing to examine the loss.

Overall, however, the courts have shown great deference to institutions. When medical students at George Washington University protested substantial tuition increases over those predicted in bulletins the court found the university had every right to change its tuition since:

> Viewing the pertinent language as a whole, in the context of a university bulletin, we cannot conclude that a reasonable person would have assumed that the university intended to bind itself by the construction the appellants urge on us.[39]

The claim that rules at the time of admission form a binding, unalterable contract was challenged in Mahavongsanan v. Hall[40], in which the court recognized the need for flexibility in the "university's rules and regulations which the university is entitled to modify so as to properly exercise its educational responsibility."[41] The right of the institution to be flexible in interpreting the spirit of its rules was affirmed in the opinion in Giles v. Howard University.[42] In that case, the

Medical School varied its rules for continued progress in order to give a student several "second chances." When the student still failed and tried to challenge the institution's aberration from normal practice as a violation of contract, the court recognized the institution had done more than was legally required and had acted in the student's best interest and let the matter stand.

Contract law and promises, both explicit and implicit, in the concept of tenure have led many aggrieved faculty members to the courts. This litigation has led to accusations that the courts have taken away from the institution the right to make personnel decisions. Some critics have suggested that today decisions about tenure are made not by one's colleagues but by the courts. Edwards and Nordin (1979) question the accuracy of this perception. In a note on tenure, they write:

> Absent some clear showing of proscribed discrimination or violation of constitutional rights the courts have generally been reluctant to overturn faculty judgements on tenure...(p. 235)

Termination for cause (Board of Trustees of Compton College v. Stubblefield[43]), due to program discontinuance (Browzin v. Catholic University of America[44]) and changes to tenure policy with sufficient warning (Rehor v. Case Western Reserve[45]) have all been allowed by the courts. Dismissal due to financial exigency has also been approved in principal by the court in AAUP v. Bloomfield College[46], but the institution must prove that the personnel changes are mandated by, not masked by, financial problems.

III. LEGISLATIVE AND ADMINISTRATIVE REGULATION

Judge-made law played a diminished role as the Warren Court of the sixties was replaced by the Burger Court of the seventies. Judicial restraint led to a diminished role for the courts on campus. As the presence of the courts as regulators diminished, the presence of the legislature and the executive branch as regulators grew. In the sixties, the judiciary was higher education's Washington nemesis, a role usurped in the seventies by Congress and the President.

In 78th Federalist Hamilton contemplates the relative power of the three branches of government:

> the judiciary...will always be the least dangerous to the political rights of the Constitution;... The judiciary...has no influence over the sword or the purse... It may truly be said to have neither force nor will, but merely judgement, and must ultimately depend on the aid of the executive arm even for the efficacy of its judgements.

Having experienced the power of "the least dangerous branch", few college and university administrators would support the assertion that the judiciary has "neither force nor will." Court decisions had effected policy changes and reinstatements of students and faculty on some campuses. However, regulation by the branches which have influence over sword and purse did represent a more serious challenge. Institutions now faced the possibility of loss of funds if they tried to circumvent the goals of their new regulators.

A Different Form of Regulation

Judicial intervention, criticized because it eroded the

autonomy of colleges and universities. directly affected only the institution involved in litigation. A warning went out to all institutions that they were accountable to the standards explicated in the legal interpretation offered by the court. However, for those institutions which had always protected the Constitutional rights and other basic rights of its students and faculty there was only tacit regulation. The target of judicial regulation was an errant institution; legislative and administrative regulation targets all of higher education. It affects every institution which receives Federal funds. Autonomy is no longer the primary cost of regulation. Criticisms of non-judicial regulation delineate the cost of compliance in terms of the redirection of institutional funds to establish Affirmative Action Offices, collect data, file required reports, prepare for reviews, make structural changes to provide access for the handicapped and make compensatory damage payments. The costs are real.

Once again I ask you momentarily to put aside the negative effects of regulation and examine the goals of each piece of legislation in terms of desired ethical outcomes. Equal access to education and to employment within the academic community, respect for the confidentiality of records and the protection of human subjects in research are admirable goals. An examination of higher education's progress towards these goals found many institutions wanting. Lyndon Johnson's "Great Society" viewed equality as a goal meritorious of the full force of his administration. With the support of Congress, he began many

programs which were continued by subsequent administrations to provide an incentive for institutions to take steps towards affirmative action which would bring us all closer to a society of approximate equality.

The examination which follows of the major pieces of legislation and administrative regulations affecting higher education verifies that the intent of the regulators is not to take control of higher education, rather it is an attempt to appeal to its social conscience and responsibility. Once again the means is cause for debate, the desired end is an admirable one.

Equal Opportunity

The premise that all individuals regardless of race. creed, national origin. sex, handicap or age should be treated as equals would seem to be a truism. That Congress felt a need to legislate this "truism" suggests that as a society the United States has some ethical standards as yet unrealized. There can be no dispute that the goals of equal opportunity in legislation are commendable and that realization of these goals will result in higher ethical standards. Given the laudable nature of the goals of equal opportunity an ethical justification will not be offered for each piece of legislation described. as the result would be a repetitive restatement of the obvious.

Discrimination Based on Race

Dissatisfied with the limited progress made by court litigation, Congress determined that statutory regulation,

backed by the power of the purse would expedite the process of desegregation in the public sector. With this goal Congress passed the Civil Rights Act in 1964.[47] Title VI of the act states:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Civil Rights Act was not directed solely at the regulation of higher education; education was just one area of society affected. The Department of Health, Education and Welfare (HEW), which had responsibility for enforcement of the regulations in the field of education, delayed enforcement in higher education for several years. Not until 1969 did HEW send letters to states operating segregated educational systems informing them of their non-compliance with the law. HEW took no steps to bring these systems into compliance in the years that followed. Late in 1970 the Legal Defense Fund of the NAACP brought HEW to court in an attempt to force the Department to fully implement Title VI (Edwards et al., 1979). The court agreed with the NAACP and ordered HEW to begin compliance proceedings against the states it had found in violation of Title VI.[48]

Higher education had dragged its feet in providing equal access to all individuals, regardless of race. By 1970, 234 years had passed since the founding of Harvard, 102 years had passed since the Fourteenth Amendment guaranteed all people equal protection of the law, 16 years had passed since the Supreme Court rejected the policy of "separate but equal" in education, and 6 years had passed since Congress made clear its

expectation that exclusion based on race from activities supported by the government was unacceptable. However, at some institutions, race was still a determinant factor in access to higher education. Higher education was unable or willing to insure equal access. Governmental intervention was in order. The evolving interpretation of Title VI precludes not only purposeful discrimination but also activities which lead to a disparate racial effect. This indicates a willingness on the part of the courts to hold colleges and universities accountable to the spirit of the Civil Rights Act.

Discrimination Based on Sex

In 1972 Congress enacted one of the few pieces of legislation directed only at education. Title IX of the Education Amendments of 1972[49] prohibits discrimination based on sex in any educational program receiving Federal funds. In language which parallels the Civil Rights Act, it reads, in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of or be subjected to discrimination under any education program or activity receiving federal financial assistance.

Like the Civil Rights Act, compliance is assured by the threat of loss of federal funds.

History suggests that access to higher education has been as elusive a goal for women as it has been for racial minorities. Not until 1837 were women admitted to the baccalaureate program at Oberlin College, the first institution to offer a four year program for women. By the beginning of the Civil War, there were

only ten institutions at which women could prepare for an A.B. Higher education further stifled any growth in women's rights when in 1913 it accepted as truth the theory offered by an eminent psychologist that women could not learn as well as men because their brains were smaller. Even as late as the 1960s, men outnumbered women three to one on college and university campuses, the ratio of men to women in faculty ranks was even greater (Millington, 1979). Noting an injustice which once again higher education was unable or unwilling to correct the government expressed a willingness to intercede. Congress enacted several pieces of legislation aimed at eliminating discrimination based on sex and correcting past injustices.

Discrimination Based on Mental or Physical Handicap

Providing access for women and racial minorities may have required changing a few minds, but few structural changes and no programmatic changes were required. The process was not costly in terms of real dollars. The real cost of providing access for the handicapped made equal opportunity for this group a more difficult goal. In spite of costs the exclusion of a class of individuals from colleges and universities based solely on their mental or physical impairments is unconscionable. Similar sentiments led Congress to enact the Rehabilitation Act of 1973.[30] In language which closely parallels Title VI of the Civil Rights Act and Title IX of the Education Amendments, the Rehabilitation Act provides:

> No otherwise qualified handicapped individual in the United States....shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

When faced with implementing the Act, colleges and universities were primarily concerned with two issues. Some administrators interpreted the statute as mandating access to programs for individuals who would be able to meet all requirements if it were not for their handicaps. One student who shared this perception brought suit against a registered nursing program which sought to exclude her due to her serious hearing impairment. The Supreme Court clarified the statute in Southeastern Community College v. Davis differentiating between individuals who would meet established criteria if not for their handicaps and individuals who meet the criteria in spite of their handicaps. Only the latter is prohibited by the Act.

The second concern of administrators stemmed from a fear that every building on campus would have to be made accessible to the physically impaired. These individuals had misinterpreted the requirement that programs when viewed as a whole would be accessible. Some structural changes would be necessary, and they would be expensive, but modification of every campus building was not required.

Employment Discrimination

Congress has demanded equal access to employment regardless of race, sex, age or handicap by enacting Title VII of the Civil

Rights Act, the Rehabilitation Act and the Age Discrimination Employment Act as amended. Like most anti-discrimination legislation, these acts were not limited to higher education, but the intent to have an effect on educational institutions was clear. When Title VII was amended in 1972, Congress noted that discrimination was as pervasive in education as in any other field.

Underemployment of women and racial minorities in higher education is well acknowledged. Furthermore, once hired, these individuals are not always guaranteed equal treatment. Access to employment alone will not correct these problems. Affirmative action, mandated by the legislation, is designed to go beyond neutral hiring practices, requiring employers to make an extra effort to recruit, hire and promote members of previously excluded groups. Absent this added effort, the status quo may be perpetuated (Edwards et al., 1979). Affirmative action serves both as a moral mandate and a game plan to assist society in achieving the state of approximate equality.

The success of affirmative action is difficult to measure. Critics attack its high costs and the fact that it fails to consider the special nature of the academic community. In its report on government regulation in higher education, the Sloan Commission proposed that a Council for Equal Opportunity in Higher Education be created in the Department of Education to monitor all equal opportunity laws. The Council, which would replace the existing monitoring agencies, would be extra sensitive to the collegial nature of colleges and return much of the

monitoring responsibility to the institutions. In his dissent from the report, Judge Higginbotham saw no need for education to receive special attention. Expressing his concern over the desire of many panel members to restore the past academic traditions, including self governance, he reminds them that academia traditionally was white and male. He is understandably reluctant to return to the old way (Sloan Commission Final Report, 1980).

Equal opportunity must continue to be a goal of higher education. For too many years colleges and universities shirked responsibility in this area forcing the government to champion the cause. Now that institutions are asking to start anew, it is understandable that some individuals are skeptical about the prospects for the success of self-regulation .

Other Issues Subject to Regulation

Given a special cause, the Federal government has indicated a willingness to regulate education directly. The best example of its willingness to correct errant behavior by schools, colleges and universities, and its ability to do so swiftly and perhaps without sufficient thought is the Family Education Rights and Privacy Act[52] (FERPA), commonly referred to as the Buckley Amendment.

Citing examples of violations of the privacy of students and their parents by schools which released personal information about students to organizations and individuals without authorization of the student or his parent, Senator Buckley

proposed an amendment designed to protect the privacy of and insure some level of accuracy in school records. FERPA was passed swiftly, without full hearings or the opportunity for colleges and universities to shape the legislation into a less cumbersome and potentially more effective law. The act is one more piece of regulation which was enacted with good intention to correct unacceptable violations of individual rights. It may not be the best means of regulation but it serves as a warning to education that the government will protect the rights of its citizens. The protection of human subjects in research and the laws designed to protect copyrights, which both affect higher education, give further credence to this warning. If higher education intends to deny access to individuals, fails to respect individual rights to confidentiality of records, property of copyrights, or safety as subjects in research, then the government can and will intercede to remind and demand high ethical standards.

IV. THE FUTURE

This examination of the regulation of higher education by the courts and the legislature and administrative regulatory bodies substantiates the claim that regulation has served as a means of achieving higher ethical standards. This positive effect has too often been lost amidst valid criticisms of regulation for diminishing institutional autonomy, and being costly in terms of money and other resources. The conflict between higher education and the government is not irreconcilable but the focus of the argument must be redirected.

The Federal government has established policies to assure justice and equity in the dealings between a college or university and its students and faculty and to promote access to education and employment for minority constituencies. Most faculty and administrators in higher education would applaud these goals. College and university administrators believe that they are most acutely aware of the best ways of running their institution. Feeling sufficiently constrained by the finite nature of their resources, they reject overly-broad or ill conceived regulation which places further drain on resources. The courts and most elected officials would agree that college administrators have both the expertise and authority necessary to determine the course of higher education. These goals of the government and of institutional administrators are not in opposition. There is shared ground between them. However, this commonality was lost in an argument which for years has focussed on the authority of the government to regulate. Rather

than directing their attacks on the end of regulation itself, critics should focus their attacks on the specific means of regulation proposing to the regulators less burdensome means to comparable ends. Some redirection of criticism has already occurred. Individual institutions and national organizations now monitor legislation which may affect higher education, lobby legislative leaders, present alternative plans for pending legislation, react to proposed regulations in the Federal Register, and file friend of the court briefs designed to increase the court's awareness of the intricacies of colleges and universities which are germane to the judicial decisions. In this stance, the reality of regulation is accepted, but in the spirit of compromise both sides work together to find the least onerous means to achieve the desired ethical ends.

Why Must the Government Serve as Higher Education's Conscience?

As colleges and universities accept the reality of judicial and legislative regulation which demands ethical accountability, the question must be raised, not of the legitimacy of this role, but rather the necessity of it. Higher education has long pointed with pride to its professionalism. Why should the role of ethical guardian of higher education be foisted on the courts and legislatures? Can't it regulate itself? Jenkins (1978) addressed the concerns of forcing the courts to act as ethical guardian to society in his article on the death penalty cases. He points out the contradiction in asking Federal courts to serve as both social conscience and courts of law. Conscience, he argues, deals spontaneously with a particular wrong; the rule

of law, however, deals with general regulations to be applied dispassionately to all cases. The two goals are not always consistent. As a result the court arrives at decisions which are viewed as both admirable (morally) and objectionable (legally). The fault for putting judges into this dilemma lies with society. There is conflict between the goals and ideals we espouse and the sacrifices demanded of us to achieve these ideals. Jenkins notes that as we realize the heavy price required to reach our ideals we balk at taking the responsibility and force the Federal courts to do what we know we should do but for varied reasons are unwilling to do. He argues the use of the courts as temporary ethical crutches is unacceptable, warning:

> ...it is all too easy to become so dependent upon crutches, whether they be physical or moral, that we cease to make the effort to do without them. Then the limb that was to be repaired, instead withers away. When the limb in question is the conscience of a people, that is an outcome that is awful to contemplate" (p. 180)

Similarly, Justice Learned Hand (1942), speaking on the contribution of an independent judiciary to civilization, warned about the limitations on what a court can conceivably do to maintain equity and a sense of fair play in the society. He was pessimistic about a society which forces courts to maintain these principles, cautioning:

> ...a society so riven that the spirit of moderation is gone, no court can save; ...a society where that spirit flourishes, no court need save; ...a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. ...What is the spirit of moderation? It is the temper... which has faith in the sacredness of the individual (p. 125-6).

Is the Government Still Willing to Serve as Social Conscience?

The question of whether or not the role of conscience should be foisted upon our courts and legislatures, while worthy of consideration, may soon be moot. The inauguration of President Reagan and the gradual implementation of his program of a "New Federalism" signal a philosophical change in the role of government in society. This change will be noted on two fronts. First, the role of the courts will change. We are entering a period which will be marked by judicial restraint. Second, the new administration has promised a period of less government. The diminished role of the government will begin with a period of deregulation.

The passing of the era of the liberal Warren Court of the sixties into the moderate-conservative Burger Court of the seventies, with personnel changes marked by the appointment of four politically conservative justices by President Nixon and a moderate by President Ford, has already led to an increased posture of judicial restraint. The deluge of constitutional cases decided by the Supreme Court in the sixties and early seventies has been replaced by a mere trickle of Constitutional cases reviewed by the court today. President Reagan has already had the opportunity to appoint one member to the high court. Although Justice O'Connor is not as conservative as the President, her views on the role of the judiciary in a democracy coincide with his. During the campaign Reagan promised to appoint justices who were not prone to expansive interpretations of the law. Justice O'Connor, like the President, believes that most legal

judgements should come from the legislatures and the state courts and that there should be less Federal intervention in state and local matters (First Woman Justice, 1981). It is this stance of judicial restraint which will dominate the court through the eighties. The health of several of the other Supreme Court justices is so poor that in the irreverant words of the National Review, "it is a coin-toss each morning whether they report to the office or to the intensive care unit" (Supreme Court Choice, 1981). This suggests that President Reagan will have the opportunity to make several more appointments to the Supreme Court during his term and thereby potentially direct the role of the Federal judiciary for many years to come. In the future, one can expect the high court to exhibit a high degree of restraint in all legal matters, even when an ethical cause would seem to mandate judicial intervention.

The second area of government interference in higher education, legislative and administrative regulation, has also come under close scrutiny by the Reagan administration. The President appointed a task force on regulatory relief to examine twenty seven sets of rules, the repeal or modification of which might lead to less government. The rules subject to review comprised most of the affirmative action regulations, including Executive Order 11246 and Title IX of the Higher Education Amendments of 1972 (Fields, 1981b). An indication of the attitude of the new administration toward regulation of higher education was provided in an address by Thomas Anderson, a special assistant to Secretary of Education Bell. Promising

colleges and universities would have more authority to regulate themselves and that compliance with Federal regulation would be left to the discretion of the institution, he assured changes which would result in less paperwork and lower costs to institutions (Winkler, 1981).

Proposals released last fall to ease the anti-bias regulations rang true to Mr. Anderson's promise. Proposed new guidelines for Executive Order 11246 would require written affirmative action plans only from institutions with a federal contract over one million dollars. The trigger amount had been fifty thousand dollars. Reviews of the programs would be conducted no more frequently than every five years. It was estimated that 80% of the institutions now required to file affirmative action plans would be excused under the new guidelines (Fields, 1981c). The Department of Education also recommended that application of Title IX be restricted to students (a proposal later opposed by the Justice Department) and that the propriety of applying Title IX to athletics be given in-depth review. Section 504 of the Rehabilitation Act of 1973 and the guidelines issued by the EEOC on sexual harassment were also targeted for review (Fields, 1981c).

In addition to proposing the review of selected regulations President Reagan has taken steps to withdraw from administrative agencies powers he believes belong to Congress alone. On this basis, he ordered the Internal Revenue Service to stop denying (without Congressional approval) tax exempt status to institutions which practice discrimination (Fields, 1981a). Arguing that his

opposition to the agency action was on procedural, not substantive grounds. President Reagan subsequently sent legislation to Congress which would change the IRS Code (Fields, 1981b).

While the intent to deregulate is clear, the political feasibility of less government in the New Federalism is less certain. Finn (1981) notes that although the liberal consensus in Washington has been shown the door, there has been no abandonment of desegregation and non-discrimination policies. and more important, to the chagrin of some, the liberal policies have not been replaced by conservative activism. Time alone will provide a gauge of President Reagan's success in his battle to dismantle well established bureaucracies. However, if bureaucrats follow the administration's direction through the eighties, the responsibility for ethical compliance with Federal regulations will rest much more so on the individual institutions than on government enforcers.

Is Self-Regulation Possible?

In the absence of external regulation can (and will) colleges and universities police themselves? In recent years there have been several proposals focussing on self-regulation. In response to the governmental regulation and in an attempt to create ethical guidelines which would prevent the need for future governmental regulation, the American Council of Education (ACE) established an Office on Self-Regulation in 1978. The purpose of this office is to prepare guidelines for colleges and universities addressing such troublesome issues as the use of

standardized testing, student recruitment, the use of human subjects in research, and the treatment of the transcripts of student athletes. ACE solicits advice from national organizations and representatives of colleges and universities as it drafts policies. The guidelines are designed to simultaneously address the needs of the clientele affected by each issue and the concerns of institutions trying to avoid overly cumbersome regulation (El-Khawas, 1981).

Finn (1981) also calls for self-regulation within the educational community. A precept of his agenda for a new consensus in education calls for a new relation between the Federal government and colleges and universities. In exchange for governmental recognition of academic freedom and institutional sovereignity, he suggests the educational community should "vigorously regulate and discipline itself" (p. 63). Self-regulation represents one way to fill the void created by the anticipated diminished role of the courts and the Federal government in ethical regulation of higher education.

Self-regulation, of course, has its limits. It becomes too easy to talk about higher education as a collective and hold every member of that group accountable for the actions of any college or university. No matter how admirable the ACE agendas may be, there will always be institutions which bypass the guidelines. Regional accreditation is one attempt to insure quality in higher education, which is bypassed by some institutions. These institutions survive without formal accreditation. Even when institutions accept guidelines from a

national organization the incentive to comply with them is diminished in the absence of meaningful sanctions. Few applicants for academic positions today bother to ask whether or not the institution with which they seek a position is on the AAUP censure list. This sanction has become almost meaningless. In cases where the sanction is meaningful, it often lacks finality. Subsequent appeals to the judicial system often occur. This has happened in rulings affecting athletic conference violations. There will always be exceptions to the rules. Some colleges eluded Federal regulation by refusing Federal funds. Hart's (1961) minimal content of natural law recognized that members of a society are neither angels nor devils and their limited understanding and strength of will mandated a coercive system in which the voluntarism of self-regulation could exist. The proposals for self-regulation make no mention of sanctions and any discussion of self-regulation without some form of coercion is gratuitous.

In spite of the problems associated with self-regulation, the discussion must continue. As higher education enters a period of decline resources will become even more scarce. Fewer applicants, diminished financial support, reductions in force in some programs all point to a time when it will be even more costly to retain the ethical ideals which require real sacrifice. The need for a conscience on campus will be greater than it was during growth years. Some form of ethical regulation must remain. If the government is unwilling to serve as conscience, and the institutions are unable to regulate themselves, perhaps the two

could work together in this regard and succeed in a partnership which had previously failed. Higher education could police itself, relying on the government when coercion is required.

A Starting Point

Finn's agenda for a quality based consensus in education is a starting point for dialogue. His suggestion that "the mistrustful, exploitative and adversarial relationship that now exists between government and educational institutions should be reformulated" (p. 63) is worthy of consideration. The word reformulated holds the key. Working together government and higher education may be able to achieve many of the goals desired by the government via a means determined by the educational institutions. The problems of the past have been the means of achieving goals; the goals became lost in the power struggle over autonomy. In many cases the government and the institution favored the same goals, but chose to act as adversaries due to disagreement on how best to implement the goals. Working together, the goals may be realized more expeditiously and at a much lower cost to the autonomy of the institution. In the absence of this cooperation, there may be no means to ethical regulation of higher education. The search for some form of conscience must continue.

V. SUMMARY AND FINAL NOTE

The increased judicial activism of the sixties and the added legislative and administrative regulation of the seventies have effected many changes on the campuses of colleges and universities in this country. Among the changes were an increased presence of social conscience and a higher ethical standard. These positive effects have often been obscured by the more pernicious effects of decreased institutional autonomy and increased costs. Admittedly, the dependence of higher education on the courts and the legislature to act as its "conscience" may not have been healthy. Critics would argue that colleges and universities should be able to ethically regulate themselves without foisting that role on the government. The validity of the criticism may soon be tested.

The reality of the "New Federalism" of the eighties is that the ethical crutch is being removed. Most colleges and universities will applaud this move because it will result in an increase in institutional autonomy and a decrease in regulatory costs; few will take time to note than an ethical vacuum will be created. Let me offer a word of caution to those individuals and institutions quick to applaud the new wave of judicial restraint and governmental deregulation. Take note of this loss of incentive to high ethical standards. A moment of silent prayer to mark the passing of this conscience, and a word of thanks for a difficult job well done may be in order so that amidst the celebrating we don't lose sight of the pitfalls

which now lie in the difficult road ahead.

FOOTNOTES

1. Siegel v. Regents of the Univ. of Cal. 303 F. Supp. 832 (N. D. Calif. 1970).
2. Soglin v. Kaufmann 418 F. 2d 163 (7th Cir. 1969).
3. Brooks v. Auburn Univ. 412 F. 2d 1171 (5th Cir. 1969).
4. United States v. Associated Press 52 F. Supp. 362, 272 (S. D. N. Y. 1943).
5. Pickings v. Bruce 430 F. 2d 595 (8th Cir. 1970).
6. Tinker v. Des Moines School District 393 U.S. 503 (1969).
7. Id. at 508.
8. Griswold v. Connecticut 381 U.S. 479 (1965).
9. Id. at 482.
10. Cooper v. Ross 472 F. Supp. 802 (E.D. Ark. 1979).
11. Starsky v. Williams 353 F. Supp. 900 (Arizona 1972).
12. Papish v. Bd. of Curators of the Univ. of Missouri 410 U.S. 667 (1973).
13. Id. at 670
14. Joyner v. Whiting 477 F. 2d 456 (4th Cir. 1973).
15. Healy v. James 408 U.S. 169 (1972).
16. Id. at 196
17. Gay Alliance of Students v. Matthews 544 F. 2d 162 (4th Cir. 1976)
18. Widmar v. Vincent 50 U.S.L.W. 4062 (Dec. 8, 1981).
19. Id at 4066
20. Futrell v. Ahrens 88 N.M. 284 (1975).
21. See Brush v. Pennsylvania State Univ. 414 A. 2d 48 (1980) and American Future Systems v. Pennsylvania State Univ. 618 F. 2d 252 (3rd Circ. 1980).
22. Piazzola v. Watkins 442 F. 2d 284 (5th Circ. 1971).
23. Smyth v. Lubbers 398 F. Supp. 777 (W.D. Mich. 1975).

24. Dixon v. Alabama State Board of Education 294 F. 2d 150 (5th Cir. 1961).

25. Id. at 159.

26. Woody v. Burns 188 So. 2d 56 (1966).

27. Connelly v. The Univ. of Vermont 244 F. Supp.(D.C. Vt. 1965).

28. Bd. of Curators of the Univ. of Missouri v. Horowitz 435 U.S. 78 (1978).

29. Id. at 85.

30. Bd. of Regents v. Roth 408 U.S. 564 (1972).

31. Perry v. Sinderman 408 U.S. 593 (1972).

32. Brown v. Board of Education 347 U.S. 483 (1954).

33. Id. at 495.

34. Alabama State Teachers Ass'n v. Alabama Public School and College Authority 289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969).

35. Univ. of Cal. Regents v. Bakke 438 U.S. 265 (1978).

36. Id. at 320.

37. Steinberg v. Chicago Medical School 354 N.E. 2d 586 (1976).

38. Behrend v. State 379 N.E. 2d 617 (1978).

39. Basch v. George Washington Univ. 370 A. 2d 1364 (1977).

40. Mahauongsanan v. Hall 529 F. 2d 448 (5th Cir. 1976).

41. Id. at 450.

42. Giles v. Howard Univ. 428 F. Supp. 603 (D.C. 1977).

43. Board of Trustees of Compton College v. Stubblefield 94 Cal. Rpts. 318 (1971).

44. Browzin v. Catholic Univ. of America 527 F. 2d 843 (D.C. Cir. 1975).

45. Rehor v. Case Western Reserve 331 N.E. 2d 416 (1975).

46. AAUP v. Bloomfield College 346 A. 2d 615 (1975).

47. 42 U.S.C.§ 2000d.

48. Adams v. Richardson 480 F.2d 1159 (D.C. Cir. 1973).

49. 20 U.S.C.§ 1681-86.

50. 29 U.S.C.A. § 701-794.

51. Southeastern Community College v. Davis 442 U.S. 397 (1979).

52. 20 U.S.C.A. § 1232g.

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